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# MONTANA REAL ESTATE

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Volume 5, Issue 4

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## From the Chairman

*By John Beagle*

### MANDATORY E & O INSURANCE

In the last BRR newsletter I commented briefly on the subject of "Mandatory Errors and Omission Insurance" and explained that BRR had joined a joint task force with MAR to study this issue further. The task force has now concluded with its meetings and will be reporting the results to the MAR Board of Directors at their annual conference in West Yellowstone later this month. Because a mandatory E&O insurance requirement would effect all licensees in the state, two surveys concerning this topic are being proposed.

One survey is being prepared by MAR and will be sent to its members. I understand that this survey will question other issues besides mandatory E&O insurance. The other survey will be sent out by BRR to all brokers and will give a brief description of how mandatory E&O would work and ask for your response to some questions. You may have received both surveys by the time you receive this newsletter.

Please keep the following four important questions in mind when considering mandatory E&O in Montana:

1. What are the reasons a state would consider a mandatory errors and omissions program?
2. What might a proposed policy include? What about the minimum limits of liability, deductible

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## Are You Raising Fees Again?

Actually, the Board of Realty Regulation has not raised fees for many years. Montana law requires that fees must be charged commensurate with costs. This requires the Board to pay their own way. We get no general fund money to operate this board.

The last adjustment made to all fees collected by the board was 1987, with fees also being revised in 1989. We have amended specific fees over the years, such as the fees charged by the exam service, implemented the late renewal fee required by the legislature and the fee charged by CE courses and instructors for approval. Following those increases in the 80's, we experienced a period of steady growth of cash reserves. For several years, by executive order, our appropriation was held to current levels with no increase in expenditures allowed and in the mid 90's our appropriation was reduced, while our license numbers increased, generating more revenue. This resulted in collecting more revenue than we were spending, while getting farther and farther behind on servicing our licensees.

Since the adoption of the last fee increase the Board has implemented many services to our clients, you the licensees. We offer a 12-hour continuing education caravan annually throughout the state, we have increased our staff by hiring a full time receptionist/licensing aide position, a part time Education Director and created the Director position. We publish the newsletter on a regular basis rather than on a hit and miss schedule. We are implementing the "rookie" CE course, we have a full time auditor, we offer the 20 hour pre-licensing course for property managers, and we have taken a more visible role in communicating with the licensees and a more proactive role in regulating this profession.

Additionally to the list of accomplishments over the years, we also have been faced with a decline in the number of licensees. We had a licensee high of 5521 in 1996. We have seen a decrease in the number of licensees who renew each period. The following chart shows the steady

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Sherri Johnson, Licensing Technician

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amounts and anticipated costs (for residential and commercial practitioners)?

3. What are the consequences if the real estate licensee fails to carry the required coverage?
4. Montana has a recovery fund for claims against real estate licensees, shouldn't this protect consumers wronged by licensees?

**What are the reasons a state would consider a mandatory errors and omissions program?**

There are three problems which mandatory errors and omissions insurance is designed to address. The first reason for implementing mandatory insurance legislation is to protect consumers from errors and omissions of real estate licensees. The purchase of one's home is the largest investment most consumers make in a lifetime. An undisclosed problem or misrepresentation will likely have an adverse effect on that consumer and if the licensee who caused the damages is uninsured, it is likely that the consumer will be without recourse.

The second reason for mandatory errors and omissions insurance is that this coverage, through a private insurer, is costly for real estate licensees to obtain.

Premiums may range from \$300 to \$500 (or more) per licensee, depending on the type of real estate activities performed. Insurance on the open market is generally sold on a firm basis. The entire firm must purchase a policy, and individual licensees do not have the option to obtain insurance. It is simply not affordable for many brokers to pay for the entire firm at these prices. Many insurance companies have minimum premiums for firm policies. The minimum premium amount may be \$1000 - \$2000. Many small companies may not be able to afford this minimum premium and therefore go without any insurance coverage.

A third problem that mandatory errors and omissions insurance may alleviate relates to individual coverage. Since insurance is generally available to firms only, individuals who change firms may find themselves unprotected by their firm's policy. Most firm policies only cover claims against members of the firm for acts of the licensee while associated with that firm. If a licensee of Firm A is sued for an act which occurred while a licensee was working for Firm B, Firm A's insurance will not cover this act. Depending on the type of insurance that each firm has, an individual may find himself/herself without coverage. Also, since some firms do not carry any insurance, an individual working for that firm has no option available to obtain insurance for himself/herself. Mandatory real estate errors and omissions insurance is designed to address these problems.

**What might a proposed policy include? What about the minimum limits of liability, deductible amounts and anticipated costs (for residential and commercial practitioners)?**

The typical mandated policy has \$100,000 coverage per occurrence, per insured licensee. However, this amount can usually be increased to match individual needs, through small premium increases. The deductible amounts vary. Some mandated policies offer zero deductible for legal expenses and \$1000 deductible for claims loss (judgements or settlements). Some policies offer a \$1000 combined deductible and some offer a \$1000 deductible for legal expenses and \$2,500 for claims loss. One company, which insures 75% of the mandated states, reports that the premiums range between \$64.00 and \$103.00 per licensee per year. South Dakota, our neighbor to the southeast, has had mandatory E&O insurance for 7 years. For the year 2000 their policy is \$100,000 per claim/\$500,000 annual aggregate with deductibles of \$1000 per claim for damages and \$500 per claim for expenses (attorney fees). Their annual premium per licensee is \$93.00. Most policies also offer optional coverage for:

- Tail Coverage (coverage for 1,2 or 3 years after one leaves the business)
- Coverage for Fair Housing claims
- Coverage for environmental issues
- Increased limits of liability

### **What are the consequences if the real estate licensee fails to carry the required coverage?**

One important point to remember is that the licensee is not required to buy the policy that the State of Montana could be offering. If a firm has a good relationship with an existing carrier and the firm is satisfied with that carrier's rates AND if the minimum requirement of their policy meets the state's minimum requirements (i.e. \$100,000 per occurrence - if this is what Montana has) the firm may retain their present carrier. If an individual can find coverage from another company that meets this minimum they may do so.

To answer the above question, the legislation in other mandated states typically provides that a licensee may not renew his/her license on active status without purchasing the group plan or providing evidence of other insurance coverage which meets the minimum statutory requirements. Failure to carry the required coverage would mean a licensee would be placed on inactive status until the required coverage is obtained.

### **Montana has a recovery fund for claims against real estate licensees, shouldn't this protect consumers wronged by licensees?**

The recovery fund is designed to protect consumers from unsatisfied judgements against licensees. Errors and omissions insurance is designed to protect consumers from honest mistakes and omissions by licensees.

The additional burden on the recovery fund, from claims other than unsatisfied judgements, would wipe out funds available to consumers for claims. Fraud claims are not eligible for coverage under any E&O insurance policy but are through the recovery account. The recovery fund was established to cover claims for which no other means of recovery exist.

Also, the utilization of recovery fund monies for negligence claims would basically turn the Board of Realty Regulation into another tribunal and claimants would bring actions to the Board instead of going to court.

As you can see, mandatory errors and omissions insurance is a well thought out program and endeavors to protect both the consumer and the licensee.

At the time that I am writing this article (September 3rd) BRR has not yet made a decision to pursue legislation for mandatory errors and omission insurance. We have proposed language for legislation but this is because the State of Montana requires that ANY Bureau proposed legislation be completed and submitted to the Bureau Chiefs by August 18th. If we decide to go ahead with this issue, the wording is in

place. If we decide not to pursue this issue, then we don't. Most of the task force representatives were in favor of the program, but we want to get the endorsement of MAR as their members represent a majority of the licensees. We are working on this issue and when you get this article, more questions should be answered.

## **Meet the New Staff**

Greetings,

My name is Sherri Johnson. I have lived in Helena since 1982, moving here from the Cascade Mountain Range in Oregon where I grew up. I love the mountains and the pine trees, so it seems like I never left Oregon. I have been married 15 years in December and have two lovely children. My son is 11 and my daughter is 9 in October. I enjoy our quiet time in the morning, having coffee and talking before the rush of the day begins.

I worked for the Board of Medical Examiners for 15 months prior to accepting my position with the Board of Realty Regulation. I must admit that the level of professionalism and out-going attitude of the staff here is a joy to work with.

If you have any questions or concerns, please feel free to call.

Note: Sherri has filled our receptionist/administrative assistance position. She is responsible for the property management licensing program and provides support to our auditor in addition to her other duties.

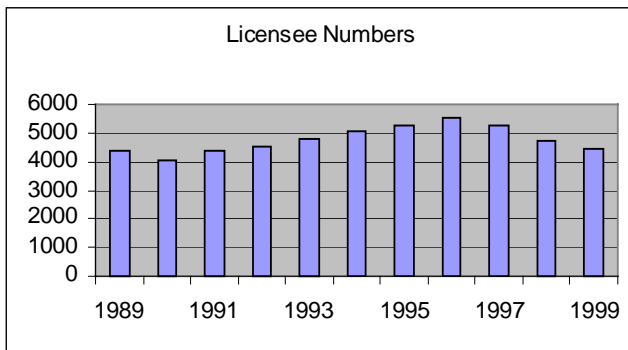
## **AUDITOR ALLSTARS**

The Board is implementing a new column in the newsletter devoted to those brokers and property managers who were given a clean audit with no exceptions. These audits were reported to the board at their June meeting. We congratulate them all!

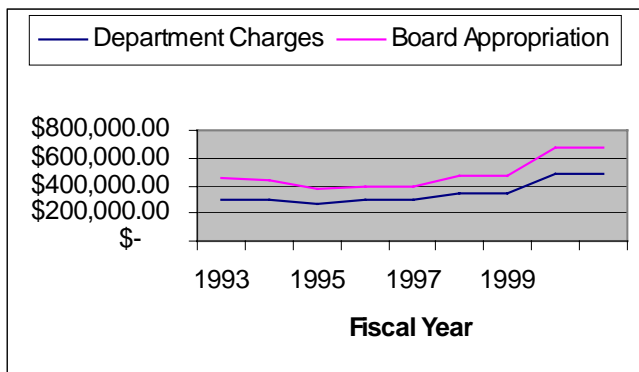
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Vincent Grillo

increase in the number of licensees until 1996, and then the steady decrease.



Adding to this decline in the number of licensees from whom we generate revenue, we have also seen an increase in the cost of our doing business. We have moved into a new building with higher rental rates, we have upgraded our computer system, we have increased our staff and most importantly, we have increased our services to licensees. It is more expensive to belong to State government than ever before. Our fees to the Division, Department and government services have steadily increased, eating away at the cash we use to spend on licensee services. Travel has become more expensive as well as technology demands have increased. We now pay fees to the Information Services Division of the State for every computer we have on a desk. These fees were unheard of 10 years ago.



You have a board comprised of people dedicated to holding costs to a minimum. Remember, the majority of them are licensees too. But you also have a board dedicated to protection of the public, including licensees, and maintaining a professional level of service to their customers.

## Educational Concerns: Misrepresentation, Continuing Education and Pre-licensing

*Mike Meredith, Education Director*

A recent complaint has led to a concern about course management procedures. That concern is validation of attendance at classes. Signing in several times during the class sessions may seem to be a redundant and unnecessary exercise, but it is required of instructors and it does provide proof of attendance if needed. However, signing in for someone else who is no longer in attendance would appear to be unprofessional conduct and an obviously dishonest act. Even though this may seem to be a small indiscretion, on a larger scale this kind of misrepresentation can lead to erosion of trust for all in the profession when it becomes public knowledge. Clients and those in other professions may mistakenly suspect that these kinds of things are common practice in the real estate profession. The filed complaint was resolved with a letter of instruction being sent and a letter concerning monitoring of attendance is being sent to all instructors.

As we approach the final three months of the year I have received an increasing number of calls with concerns about continuing education. Primarily, people are asking where they can take classes and what topics are being offered. There are many classes being presented in the next three months both in traditional settings and through computer access. This issue of the newsletter contains the most up to date information that we have on courses, but the Board of Realty Regulation's Education Committee reviews and approves (and sometimes rejects) new courses at every board meeting. Please call me if you have specific questions about courses.

Finally, a word of caution for salespersons who have taken, or will take, a pre-licensing course in preparation for getting their broker's license. Pre-licensing courses do not count as continuing education. The sixty hours of class taken as one of the requirements for obtaining a broker's license do not help fulfill the twelve-hour continuing education obligation for the year. Pre-licensing course work is held to contain basic, fundamental information needed to begin work as a broker. Continuing education classes should provide a more advanced level of education for licensees practicing their profession. In

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## NOTES FROM THE AUDIT TRAIL

*By Jim Barker*

### SO YOU'RE BEING AUDITED

The one comment that I hear more than any other is, "when I received your letter I got really nervous about being audited." I think most of the nervousness is caused by the word "Audit." Those IRS guys have really given the rest of us a bad name.

There is no need to be nervous about being audited. I thought, perhaps, it might relieve some of the anxiety if I went over what happens during an audit. I will break the audit process down into 6 steps and explain each.

1. Most of you will receive a letter notifying you that you are scheduled for an audit of your trust account and related sales documentation. Notification is not required but I realize that most of you are very busy and it seems reasonable to provide notice whenever possible. The scheduled times are tentative, however, I will try to call if I am going to be ahead or behind schedule by more than 30 minutes.
2. The second step, officially called the entrance interview, is an opportunity for us to get acquainted and for me to explain what is going to be required of you for the upcoming audit. The entrance interview also provides you with the opportunity to ask any questions you may have.
3. The third step is the actual trust account audit. During this portion of the audit I will verify that all the information you have supplied to the Board of Realty Regulation is correct and current. I will look at your records to insure that you have an accounting system in place that meets the requirements set forth in Chapter 58, Sub-Chapter 4 of the Administrative Rules of Montana. Most brokers have very little trouble with this portion of the audit unless they have failed to reconcile the accounts or are not keeping adequate records.
4. The final step in the financial portion of the audit is

the individual transaction ledger. When looking at your individual transaction ledger I am checking to make sure that it also complies with the requirements set forth in Chapter 58, Sub-Chapter 4 of the Administrative rules of Montana.

5. After completing the financial portion of the audit I move on to the compliance audit. Surprisingly, this is the area where most of the problems are found. This portion of the audit involves selecting a sample of your completed transactions and verifying that all relevant rules and regulations have been complied with.
6. During the final step, the exit interview, I will sit down with the broker or his representative and discuss each of my findings. This gives you the opportunity to look at the transactions and double check my work. If there are findings, I will make recommendations for changes in the accounting process and or office policies.

In the vast majority of cases the audit process is not the least unpleasant and most view it as being very informative and helpful. The only time there are really unpleasant consequences is when I find evidence of intentional fraud or gross negligence on the part of the broker.

If you have any additional concerns when you get your notification please feel free to contact me by phone at (406) 431-7745 or by e-mail at [jbarker@state.mt.us](mailto:jbarker@state.mt.us).

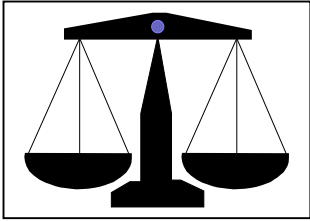
## DON'T SEND THOSE SALES LICENSES IN

**Attention all new broker applicants.** The Board of Realty Regulation has changed the application requirements when going from a salesperson to a broker. You no longer have to include your sales license. You may continue to work as a licensed salesperson under the supervision of your broker until you receive your new broker license in the mail.

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the past couple of years a few broker candidates have gotten misinformation and assumed that broker pre-licensing classes would complete their continuing education requirement. The sad result of the misinformation was that they were short of hours at the end of the year and they had to scramble to complete the required education.





# COMPLAINT SCREENING COMMITTEE

*By Terry Hilgendorf*

Two meetings were held since my last report, including our first ever meeting in Sidney. I'd never been to Sidney and found it to be a beautiful town. Our Board Chairman and host, John Beagle and family has a long history in Sidney and everyone in town knows John. Of course we stayed at the Beagle Inn, ate at the Beagle Café, shopped at the Beagle General Store and had our meeting at the Beagle Bank & Trust. It was evident from everyone we met that John is highly respected, and rightfully so. Thanks, John and Susie for the royal treatment.

We were busy at these two meetings, hearing 22 complaints, reviewing one investigation and a large bunch of audits. Of the complaints, we dismissed 11, dismissed 7 with letters of instruction, tabled 1 and sent 3 to investigation.

## **Dismissed/Tabled Complaints:**

Except for the complaint we tabled because it is under court appeal, the dismissed complaints involved subjects over which the Board had no jurisdiction. These included commission disputes, terms of or requests to enforce private contracts, and even a complaint because the listing licensee had caused a divorce. We also had one complaint we could not understand and had to dismiss. The only dismissed complaint worth mentioning inquired whether KOA could sell its Option to Purchase without utilizing a real estate broker. As part of the KOA franchise agreement, KOA reserves a first option to purchase if the owner ever intends to sell the property. On occasion KOA would find a buyer for the property and assign their interest in the option to the new buyer. An analysis by the Board attorney determined the Board should not interfere. I'm sorry there wasn't anything interesting to learn from the other dismissed complaints, but there just wasn't.

## **Letters of Instruction:**

Now, here are complaints with things we can

learn. In the first complaint a licensee initialed an attendance sheet for another licensee during a CE class. The second licensee attended part of the class, but had left before the list needed to be initialed. No completion certificate was requested by absent licensee. The letter of instruction cautioned the first licensee against initialing another persons name and the complaint was dismissed. The second complaint involved advertising of property in which the licensee was shown as a broker when he was actually a salesperson. It was a co-listing situation where the advertising had been prepared incorrectly by one licensee from one office, without being reviewed by the other. It was corrected as soon as the mistake was discovered. The letter of instruction cautioned both licensees to be more careful when advertising and the complaint was dismissed. The third complaint involved an accusation that a dual agent had not worked in the best interest of the principal in a failed transaction. The complaint also wanted the \$500 earnest money, which the licensee refused to disburse because the parties could not agree upon final distribution. There did not appear to be any violation by the licensee with regard to agency, however, the earnest money had been held since 1996, which is an unacceptable length of time. Two letters of instruction were issued on this complaint. The first letter recommended the licensee deposit the earnest money with the court and file an Interpleader. The complaint was then dismissed. During the review of this complaint it appeared another licensee may have disclosed personal information about their client to potential buyers, so the second letter of instruction went to that licensee cautioning against unauthorized disclosure of information concerning their principal. The forth letter of instruction involved a complaint accusing the licensee of poor communication. There did not appear to be a violation of any statute or rules, but the standard of practice would dictate that even if there is nothing to report, the licensee should stay in regular contact with the seller. The letter of instruction suggested the licensee stay in closer contact and report regularly to the seller and the complaint was dismissed.

Another letter involved the presentation of offers. A licensee delivered an offer to a listing agent who already had an offer. Both of the offers would be presented to the seller the next day. After hearing there was another offer, the party making the second

offer decided to increase their offer to improve their chances of it being accepted. Their agent called the listing agent and said the new offer would be delivered before the presentation. The listing agent never received the second higher offer. She presented the two original offers the next day, with the seller accepting the other buyers offer. The higher second offer had not been personally delivered to the listing agent, but instead had been sent by fax using the listing agents fax cover sheet and laid on the listing agent's desk. It was overlooked. When discovered, it was presented the next day, but the seller chose not to accept it. No apparent violation of statute or rules could be found. It was discovered that the buyer's agent, whose offer was not accepted, later contacted the seller directly, with the approval and direction of her supervising broker. This is a clear violation of Board rules. The letter of instruction reminded the salesperson and their supervising broker that it is a violation of 8.58.419(3)(y), ARM, to contact another licensee's principal directly, and the complaint was dismissed.

The sixth letter of instruction involved a complaint concerning a shortage of acreage. The seller had to refund a portion of their selling price to the buyer because it was later discovered the property contained much less property than had been represented. The screening panel has no jurisdiction over commission disputed. We felt the licensee did have the responsibility to exercise due diligence in obtaining accurate information regarding the property and the number of acres. The letter of instruction suggested to the licensee that whenever accurate acreage could not be determined, the licensee should recommend to the parties, in writing, that a survey be done to accurately determine acreage, and the complaint was dismissed.

### **Complaints sent for Investigation:**

The first complaint involved an ongoing contested case, and a request to remove a licensee from the ongoing contested case proceedings. The complainant and the licensee had resolved their dispute by civil action. However, the screening panel voted to continue the case and deny the request. The second complaint involved property the licensee advertised as bordering on forest service land when, in fact, it did not. It was moved to investigate the licensee concerning the areas of advertising, possible misrepresentation, agency, and standard of practice. Since the property had previously been sold and advertised the same way, the Committee voted to

initiate a complaint against the licensees involved in that previous transaction and to investigate them also. The third complaint involved a property manager accused of not forwarding rents to the owner and not returning security deposits. The licensee did not respond to the to the complaint, and the panel moved to investigate the possible failure to account for and distribute rent monies, as well as standard of practice. The fourth complaint involved a transaction which included the purchase of water rights. It was moved to investigate for possible misrepresentation, conflict of interest, standard of practice and agency.

### **Investigation Reviews:**

One investigation was reviewed. It involved a salesperson who is the office manager representing himself as a broker. The complaint also involved the office broker who allegedly allowed the salesperson to represent himself as a broker. The investigation revealed the salesperson did sign, on more than one occasion, form documents with the word "broker" associated with his signature. It was moved that there was reasonable cause to find the salesperson in violation of MCA 37-1-316(4), 37-1-316(5), 37-1-316(18), MCA, and 8.58.419(3)(g), ARM. The motion concerning the broker was to dismiss with a letter of instruction, reminding the broker of his supervision duties to his salespeople and under no circumstances can or should a salesperson sign any document in which he holds himself out to be a broker.

## **Look For Your Affidavit In The Mail Soon!!!**

Its that time of year again. Time to be on the lookout for your 2000 Affidavit of Education. It will be mailed to you in late October. If you have an active license it will be sent to your business address. Salespeople, that is the address of your broker. If you are inactive it will be sent to your last known home address. Make sure we have a good address as these are not be forwarded.

Take time now to review your education certificates and get your records in order. We can not tell you how many hours you have completed. Check closely to make sure you have completed 4 hours of mandatory education and a total of 12 hours in all. You don't want to find out at audit time that you are lacking hours.

## BOARD OF REALTY REGULATION CALENDAR AT A GLANCE

### October

10/9/00	BOARD OFFICE CLOSED FOR COLUMBUS DAY
10/11-12/00	ROOKIE CE COURSE - BILLINGS
10/13-17/00	ARELLO CONFERENCE – SALT LAKE CITY UTAH
10/21/00	REAL ESTATE LICENSING EXAMINATION - MISSOULA
10/25-28/00	PROPERTY MANAGEMENT PRE-LICENSING COURSE & EXAM – HELENA
10/26/00	RULE HEARING ON FEE INCREASE – HELENA
10/26-27/00	MEETING OF THE BOARD OF REALTY REGULATION – HELENA

### November

11/7/00	BOARD OFFICE CLOSED FOR ELECTION DAY
11/18/2000	REAL ESTATE LICENSING EXAMINATION - BILLINGS
11/23/00	BOARD OFFICE CLOSED FOR THANKSGIVING

### December

12/6-7/00	MEETING OF THE BOARD OF REALTY REGULATION – HELENA
12/6-7/00	BOARD OF REALTY REGULATION CARAVAN - BUTTE
12/25/00	BOARD OFFICE CLOSED FOR CHRISTMAS

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